

**Clarification on provisions of the Bill regarding appointment of company secretaries:
Reasons to cheer, *No reason to panic***

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Has the Companies Bill endangered the position of Company Secretaries by making the appointment of a CS optional? Going by some email chains, it seems a lot of confusion is going on on this issue. Some people have contended, in our view wrongly, that the Companies Bill 2009 clubs the appointment of the company secretary with some other managerial personnel, and in the process, the company may get a choice of appointing a CS, a CFO or a managing director. However, this is a mistaken view.

We have examined the provisions of the Bill relating to the appointment of company secretaries. Company Secretaries have been included in the definition of “Key Managerial Personnel”. Clause 2 (zza) defines the term “Key Managerial Personnel” as under:

(zza) “key managerial personnel”, in relation to a company, means —

- (i) the Managing Director, the Chief Executive Officer or the Manager and where there is no Managing Director or Manager, a whole-time director or directors;
- (ii) the Company Secretary; and
- (iii) the Chief Financial Officer;

Clause 178 of the Bill requires “every company belonging to such class or description of companies as may be prescribed shall have whole-time key managerial personnel.”

Note the construction of the Clauses above. The definition of “key managerial personnel” (KMPs) in clause 2(zza) includes all three personnel to be called KMPs. Note the word “and” after clause (ii). This means the clause imposes all the KMPs to be appointed collectively and the intention of the law is not to allow a choice among them. If the clauses were disjunctive, the word “or” would have connected the clauses.

Further, clause 178 also does not indicate that appointment of any one of them would be sufficient compliance with law. Therefore, a company covered under such class or description as may be notified has to appoint all three personnel, i.e., the Managing Director, Company Secretary and Chief Financial Officer and not any one of them. One cannot be said to be acting as alternate for another.

Clause 178 also provided that in case of vacancy in the office of a KMP, the board has to fill the same. It cannot be that a vacancy in the office of an MD, for example, can be filled up by appointing a CFO instead. Therefore, each of the 3 classes of KMPs are independent and mandatory.

In fact, the above makes it aptly clear that the Companies Bill has strengthened the position of Company Secretaries and enhanced their place in corporate hierarchy. Company secretaries in old law were entrusted with administrative and ministerial duties – now they are been legislatively put as KMPs. The words “key” and “managerial” are quite significant. Not only are company secretaries designated as managerial personnel, they have been given the label – key.

This is surely a reason to cheer up! Contrary to the confusion being created, we are happy and upbeat about the provisions of the Companies Bill regarding company secretaries.